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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

FILE: EAC 02 213 51044 OFFICE: VERMONT SERVICE CENTER DATE: JAN 20 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fashion design firm that currently employs 275 persons and has a gross annual income of $80,000,000. It seeks to employ the beneficiary as a director of employee services/industrial nurse for a period of three years. The director denied the petition because he determined that: (1) the proffered position was not a specialty occupation; and (2) the beneficiary was not qualified to perform the duties of the proffered position.

On appeal, the petitioner presented a brief.

The first issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii) the term "specialty occupation" is defined as:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

On the Form I-129, the petitioner listed the proffered position as "Director of Employee Services/Industrial Nurse." Submitted with the Form I-129 were: (1) a cover letter from the Chief Financial Officer (CFO); (2) a letter of support from the CFO; (3) a number of documents concerning the beneficiary's educational credentials and work experience, including an evaluation of the beneficiary's work experience and foreign

schooling, by the International Education Counsel; (4) two Internet job advertisements for occupational health nursing positions offered by firms other than the petitioner; (5) a copy of financial and Federal tax return documents pertaining to the petitioner; and (6) the petitioner's most recent press kit, with articles about the petitioner and its founder.

The cover letter indicates that a great deal of the petitioner's business involves the design and manufacture of women's apparel items, and that, in the garment manufacturing process, its employees "often suffer unavoidable workplace injuries." The letter also relates that the petitioner decided to create the proffered position in order to minimize workplace injuries and reduce its healthcare costs.

The cover letter provided this summary of job duties:

> Planning, implementing and evaluating a comprehensive health and safety program that meets the needs of the companies and employees. Proper assessment and treatment of work and non-work related injuries and illness. Performs pre-placement and periodic physical assessments to establish health status of potential and existing employees. Administer medical surveillance programs to employees following department protocols and federal standards. Provide timely and competent emergency medical care to employees. Provide case management of work and non-work related injuries/illnesses following federal standards and company policies. Develop and deliver educational programs. Maintain confidential health records for all employees.

In addition to the above duties, the job posting for the proffered position also stated that the person hired for the proffered position would be responsible for "functioning independently with a high degree of proficiency at prevention, recognition, and treatment"; "[p]roper assessment and treatment of work and non-work related injuries and illness"; and providing "screening programs for early detection of disease with appropriate follow-up."

The CFO's letter of support also relates that, as part of the petitioner's Human Resources and Employee Health Services division, the beneficiary will work to improve the quality of health care and medical services to on-site employees. The letter discusses the roles the beneficiary will play, including calming the fears of injured employees, interviewing employees for health and fitness profiles, explaining healthcare matters to the employees, conferring with Human Resources personnel about health issues of each employee, writing employee patient consultations, helping to ensure that employees avail themselves

of available preventive treatments and tests, and keeping employees updated on the services to which the company insurance entitles them.

The letter states that responsibilities of the proffered position include these "secondary job duties":

1. Conducting all of our company's drug and substance abuse screening as part of our company's employee preventive health care initiatives.

2. Administering health care service and minor health medical procedures for our on-site manufacturing employees.

3. Contact[ing] medical assistants and outside physicians to facilitate specialty referrals.

4. Contact[ing] the pre-authorization department of insurance companies to get their approvals for specific procedures, such as radiological tests (MRIs, CT Scans, Bone Densitometry, etc.) and outpatient surgery.

5. Contact[ing] the patient management department of insurance companies to make arrangements for patients to obtain durable equipment such as cock-up wrist braces or back braces.

6. Set[ting] up employee health care and fitness educational seminars . . . .

The director issued a request for additional evidence about the proffered position.

The petitioner responded with a six-page letter from the CFO which included (1) numerous Internet advertisements from firms other than the petitioner, and (2) a copy of the job posting on the proffered position.

The CFO submitted these Internet documents "as proof of an industry standard and as evidence that a bachelor['s] degree in a specific field of study is the standard minimum requirement for the job offered." The CFO devotes pages to why the proffered position should not be regarded as a nursing position. Among other arguments, the CFO estimates that "less than 30 percent of this employee's time would be spent performing traditional nursing tasks."

The portion of the director's denial that was based on the specialty occupation issue indicates, in part, that the evidence did not persuade him that the duties of the proffered position

could not be performed by "a fully licensed nurse who graduated from an associate or diploma [nursing] program." This portion of the director's decision explicitly relied upon information on the registered nurse occupation that is found in the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*), at pages 268-270. Also, the director noted, in part, that he accorded "little to no weight to the industry job announcements provided by the petitioner," because of the ways in which some of the advertising firms stated their bachelor degree requirements, that is, as either "preferred" but not required or without specifying any major area of study. The director also stated that he doubted that "the cited employers are similar in nature, size, and scope to the petitioning company."

On appeal, the petitioner, through its CFO, submitted a four-page letter. The CFO first explains that it has removed the attorney that had previously assisted the petitioner, because of what the CFO sees as apparent Citizenship and Immigration Services (CIS) animosity against the attorney that "presumably has prejudiced our petition." The letter indicates that, as a possible explanation of the denial, former counsel has made assertions to the effect that, in prior H-1B petitions for which he served a counsel, CIS has decided against the petitioner by disregarding the evidence and the proper standard of review.

The letter also states that the petitioner "can't understand" why, in the instant proceeding, the director "would be less than honest and make statements that are completely untrue to justify [his] grounds for denial."

The letter argues that the director's discounting the advertisements' evidentiary weight is one example of improper action on the petition. He contends that it was unreasonable for the director not to recognize that, in the context of the jobs advertised, "bachelor's degree" without mention of a specific major "is a specific nursing degree requirement." The letter also contends that the director should have called the advertisers to confirm what they meant, as the petitioner now claims to have done. The CFO also remarks:

> Therefore[,] your statement that only three of the listed employers require a nursing degree is completely untrue. A total of ten (10) of the companies actually require a nursing degree even though the ads did not specify the word "nursing" as part of these ads[']mention of the "bachelors degree" criteria. Three (3) other companies listed the bachelor's degree as either preferred, strongly preferred or highly preferred. This type of listing, highly preferred, strongly preferred or even preferred is tantamount to a de facto bachelors degree requirement although stated in abet

> [sic] a slightly less direct manner. In fact only one company listed "related degree" as acceptable.

The CFO continues to address the advertisements, by insisting that the director had no justification "to think that since the companies cited are for different industries that that fact is somehow less substantive proof of a job['s] qualifications when in fact the reverse is true." The CFO also asserts that the petitioner has "provided convincing and substantive proof that the hiring standard for this position is consistent across all types of industries."

The letter next contends that the *Handbook* "lists an Industrial/Occupational Nurse as a completely different position than either a registered nurse or other nursing position." Furthermore, as the proffered position "has nothing to do with a registered nurse," the petitioner does not understand why the director would ask it to "differentiate the differences between registered nurses and other nursing jobs." The CFO next asserts that, as the proffered position "is a specialized position in the industry and not with the traditional medical setting," the director is depriving the petitioner of its constitutional rights by holding it to "a standard of review that does not conform with the standard set forth in the federal regulations."

Next, the letter states that, in light of CIS having acted "very curiously" in a previous petition, the petitioner was left "with the impression that you might be prejudiced against us," and "will assume that this is due to [aforementioned counsel's] involvement with this and our company's other previous petitions."

The letter requests "that you grant our motion to reopen this case so that we can have the opportunity to retain other legal counsel to represent us on this matter," and also asks for the withdrawal of the "examiner" that had earlier acted in this proceeding.

Before proceeding to a discussion of the evidence, some general remarks are in order, in light of the CFO's letter questioning the integrity of the director's action in this and other proceedings.

First, the AAO is not the forum to adjudicate issues of professional conduct by CIS officials. Second, CIS regulations do not provide for motions for additional time to appeal due to a petitioner's desire to hire new counsel. Accordingly, the AAO will not consider the petitioner's request for additional time. Third, contrary to the petitioner's assertion that the director should have contacted firms in this case to ascertain what language in their advertisements meant, CIS has no obligation to contact witnesses or take any other steps to complete or

corroborate a petitioner's evidence. Next, as should be obvious from the lengthy discussion that will follow, the petitioner's assertion that the director's decision violated the petitioner's constitutional rights is without merit. Finally, upon review of the entire record, the appropriateness of the director's denial in this proceeding is supported by the evidence of record.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (*3*) The employer normally requires a degree or its equivalent for the position; or
>
> (*4*) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

These evidentiary principles always applied by the AAO should be regarded as incorporated into the discussion of each regulatory criterion.

1. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As this burden never shifts, the petitioner is solely responsible for compiling a persuasive record.

2. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

3. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the following discussion will show, the evidence does not satisfy any of the H-1B specialty occupation criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position. -8 C.F.R. § 214.2 (h)(4)(iii)(A)(1).

The AAO routinely consults the *Handbook* for its authoritative information about particular occupations' duties and educational requirements. Here the AAO consulted the 2002-2003 edition.

Despite the petitioner's insistence to the contrary, the AAO finds that the proffered position's range of duties substantially comports with those of the industrial nurse occupation as described at page 268 of the *Handbook*:

> Occupational health or industrial nurses provide nursing care at worksites to employees, customers, and others with minor injuries and illnesses. They provide emergency care, prepare accident reports, and arrange for further care if necessary. They also offer health counseling, assist with health examinations and inoculations, and assess work environments to identify potential health or safety problems.

The petitioner is mistaken in its contention that the *Handbook* recognizes the industrial nurse occupation "as a completely different position from either a registered nurse or other nursing position." In fact, the *Handbook* clearly treats industrial nursing as a particular type of registered nursing occupation, along with hospital, office, nursing home, home health, and public health nursing. Also, the petitioner is incorrect in asserting that the proffered position "is a specialized position in industry and not within the traditional medical setting." The *Handbook* indicates that industrial nursing is an established occupation with industrial worksites as its usual work location.

The *Handbook* also clearly indicates that industrial nursing positions usually do not require a bachelor's degree or its equivalent. At page 269, it states the following about the training and educational requirements for registered nurse positions:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing

> (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
>
> . . . .
>
> . . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The *Handbook* does not elaborate on administrative nursing positions that may require a bachelor's degree in nursing. On November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions and acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.[1] The instant record, however, presents proposed duties that do not exceed those of an industrial nurse serving with an A.D.N. or a two-three year hospital diploma.

Furthermore, the petitioner's contention that the position is not really a nursing position is not persuasive, even if, as the petitioner asserts, the beneficiary would be spending less than 30 per cent her time "in performing traditional nursing tasks." All of the beneficiary's duties revolve around employee health care, whether in the form of direct care for injuries, employee physical assessments, health counseling, establishing employee health and fitness profiles by interviews, writing patient consultations, healthcare and fitness seminars, disease screening programs, improvement of on-site health care services, employee education about insurance coverage, contact with insurance companies, drug and substance abuse screening, coordination with medical assistants and physicians outside the company, helping to ensure that employees take advantage of available healthcare services, or coordination with the Human Resources department on individual employee's health issues.

As the evidence does not establish the proffered position as one that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty, the petitioner has not met the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a

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[1] Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses,* HQISD 70/6.2.8-P (November 27, 2002).

particular position so complex or unique that it can be performed only by an individual with a degree.
-8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

A. Degree requirement common to the industry.

It is worth emphasizing that, as noted earlier in this decision, "degree" as used in each of the four criteria at 8 C.F.R. § 241.2(h)(4)(iii)(A) means one in a "specific specialty," that is in a discipline associated with a body of highly specialized knowledge directly related to the proffered position. Even if the evidence had established that the advertised positions were in organizations similar to the petitioner, this criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) still would not be met, because the advertisements do not establish that their firms commonly require a bachelor's degree or higher in a specific specialty.

For the purposes of this discussion, the AAO accepts the petitioner's assertions that, in the context of the particular job advertisements submitted in this record, advertised requirements for an unspecified "bachelor degree" means a bachelor of nursing degree. Even so, ten of the advertisements clearly do not require a bachelor or higher degree in a specific specialty. Furthermore, these firms advertised for a registered nurse or someone with nursing experience, but not for a bachelor's degree: (1) AstraZenca, (2) Merrill Lynch, and (3) Becton Dickinson. Biogen (Cambridge, Massachusetts) would accept either "a BS or RN." These firms advertised a preference, but not a requirement, for a bachelor's degree in nursing: (1) the "Confidential" advertiser from Vienna, Virginia; (2) American Airlines; (3) Peterbilt; and (4) Westinghouse. The Ford advertisement "highly preferred," but did not require a bachelor's degree. Johnson Controls "strongly prefers" a bachelor's degree, but in "safety or a related field." There is no evidentiary basis for the petitioner's assertion that the words "preferred," "strongly preferred," and "highly preferred" are "tantamount to a de facto bachelor's degree requirement." As noted earlier, mere assertions without substantiating evidence are not evidence.

Another material defect in the petitioner's evidence is that the information within the four corners of the advertisements do not establish that the organizations are similar to the petitioner, and the petitioner supplied no evidence to supplement the advertisements on this issue.

A number of the advertisements provide no substantive information about the nature of the hiring organization: see, for example, the advertisements from MBNA America; Blackstone Technology Group; Synerfac Staffing Agency, advertising for "a manufacturing plant in Middletown, DE"; Micron Technology; and Johnson Controls. The names of a more significant number of the companies advertising

suggest that they are not organizations similar to the petitioner here, including: American Airlines; the firm not identified by name, but as a "Biotech, Pharmaceutical Company"; Peterbilt Motors Corporation; Abbott Laboratories; Aventis Pharmaceuticals; Western Electric, advertising for its Western Zirconium manufacturing plant; Ford Motor Company; Merrill Lynch Corporation; Becton Dickinson & Company, Biosciences; the "prestigious university in Manhattan"; Foxwoods Resorts Casino; and Alcoa, Inc.

While many of the advertisements are for positions at manufacturing plants, not all are. Furthermore, where the positions are at manufacturing plants, it is not evident that the manufacturing processes there are similar to the petitioner's in significant, practical aspects, such as the machinery and manufacturing processes involved, the range of risk-of-injury tasks, and the types and seriousness of potential injuries.

In addition to the evidentiary deficiencies just addressed, this limited group of Internet advertisements is too small to be persuasive evidence as to an industry's common hiring practices.

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Aside from the advertisements discussed above, the petitioner presented no documentary evidence about educational requirements. However, as discussed above, the *Handbook* indicates that an industrial nursing position does not normally require a bachelor's degree.

In summary, the evidence does not establish that the proffered position meets this criterion.

B. Degree necessitated by the complexity or uniqueness of the position.

Despite the petitioner's assertions, the record fails to establish that the proposed duties make the proffered position either so complex or so unique that only an individual with a bachelor's degree in a specific specialty could serve in that position. As discussed above, the position proposed for the beneficiary does not exceed the scope of an industrial nurse position occupied by a person with an A.D.N. or hospital diploma.

The director was correct in not granting the petition under either criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.
-8 C.F.R. § 214.2 (h)(4)(iii)(A)(3).

The petitioner presented no evidence on this issue, and indicated that this is the first time someone will be hired for the position in question.

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's degree or higher in a specific specialty. In fact, the duties appear no more specialized or complex than what should be expected from industrial nurse positions in general, which, as discussed above, can be filled by registered nurses who do not have a bachelor's degree. Accordingly, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Because the evidence of record failed to meet any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A), the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the applicable regulations.

The second issue in this proceeding is whether the beneficiary is qualified to perform the duties of the proffered position. The director framed his findings on this issue in this paragraph:

> Fourth, the beneficiary is not qualified to perform services in a specialty occupation. The beneficiary holds the equivalent of a United States diploma or associate degree in nursing. The Service rejects the argument that the beneficiary's registered nursing experience is equal to bachelor's level studies. Authorization to practice registered nursing generally requires and is usually associated with a diploma or associate's degree. Registered nursing experience does not involve "achievement of a level of knowledge, competence, and practice" that is equivalent to a bachelor's degree in a specialty. Moreover, the petitioner neglects to submit any evidence confirming that occupational health and industrial nurses are not required to possess a registered nurse license in New York. Hence, the record does not include evidence that

> the beneficiary is a licensed registered nurse in New York or other credible evidence that the beneficiary is immediately eligible to practice as a registered nurse in New York.

If a proposed H-1B temporary position requires a license, the petitioner must establish that the beneficiary possesses it. 8 C.F.R. § 214.2(h)(4)(v)(A) states:

> *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage employment in that occupation.

The regulation at 8 C.F.R. §§ 214.2(h)(4)(v)(B) and (C) address situations where a state provides for temporary licensure or allows the performance of licensed-required duties under the supervision of licensed senior or supervisory personnel.

As described in the record, some of the proposed duties make the question of a licensure requirement a reasonable issue. For instance, proposed duties are described as including assessment and treatment of work and non-work-related injuries, assessments of the health stats of employees and potential employees, and emergency medical care. Accordingly, licensure information is a legitimate subject of CIS inquiry.

Counsel's letter of response to the request for additional evidence was inadequate, as it merely asserted what New York law requires. Counsel provided no legal citations and no copy of relevant laws or regulations. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As this burden never shifts, the petitioner is solely responsible for compiling a persuasive record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The matters submitted by the petitioner on appeal have not remedied the lack of evidence to establish that the particular nursing duties do not require a nursing license under New York State law.

Accordingly, the petition must also be dismissed for failure to establish that the licensing requirement of 8 C.F.R. § 214.2(h)(4)(v)(A) does not apply. Therefore, the director was correct in also dismissing the petition for failure of the evidence to establish that the beneficiary was qualified to serve in the proffered position even if it had been found to be a specialty occupation.

Again, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.